IN THE

Supreme Court of the United States

October Term, 1976.

76-770

WILLIAM CAHN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Opinions Below.

In the United States Court of Appeals for the Second Circuit an opinion was rendered by the Court as part of its mandate. It is unreported and is attached hereto as Appendix A.

Jurisdiction.

1. The order of the United States Court of Appeals for the Second Circuit which is sought to be reviewed by this Court was made and entered in the Office of the Clerk of that Court on November 8, 1976.

2. No application has been made respecting a rehearing, and no extension of time within which to petition for certiorari has been granted.

3. Jurisdiction of the United States Supreme Court to review the order of the United States Court of Appeals for the Second Circuit is conferred by 28 U.S.C. Section 1254.

Questions Presented.

1. Whether petitioner's due process and double jeopardy rights have been violated by the return by the same grand jury and trial upon a superseding indictment which added thirty-five new counts to the original indictment after the trial on the original indictment ended in a hung jury.

2. Whether a conviction may lie under 18 U.S.C. Section 1001 in a situation involving statements to a non-governmental body funded in whole or in part by the federal government.

3. Whether a conviction may lie under 18 U.S.C. Session 1001 in a situation involving funding by the Law Enforcement Assistance Administration under 42 U.S.C. Section 3701, *et seq., i.e.,* whether 42 U.S.C. Section 3701, *et seq.* (Esp. Sec. 3792), pre-empts 18 U.S.C. Section 1001.

4. Whether the billing of two entities for the same travel expenses which each was obligated to pay violates any federal law, rule or regulation.

5. Whether 18 U.S.C. 1001 requires proof beyond a reasonable doubt that the alleged false statement must be *material* to the representation.

6. Whether the introduction of the evidence of "similar acts" was so prejudicial under the circumstances of this case that petitioner did not receive a fair trial.

Constitutional and Statutory Provisions Involved.

AMENDMENT [V].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §1001.

Section 1001. Statement or entries generally.—Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1341.

Section 1341. Frauds and swindles.—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated

or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

42 U.S.C. §§ 3791, 3792.

§3791. Embezzlement, theft and fraud.

Whoever embezzles, willfully misapplies, steals or obtains by fraud or endeavors to embezzle, willfully misapply, steal or obtain by fraud any funds, assets, or property which are the subject of a grant or contract or other form of assistance pursuant to this title, whether received directly or indirectly from the Administration, or whoever receives, conceals, or retains such funds, assets, or property with intent to convert such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

§3792. Fradulent and false statements or entries.

Whoever knowingly and willfully falsifies, conceals, or covers up by trick, scheme, or device, any material fact in any application for assistance submitted pursuant to this title or in any records required to be maintained pursuant to this title shall be subject to prosecution under the provisions of section 1001 of title 18, United States Code [18 USCS §1001].

Facts Developed at Trial No. 2.

William Cahn, the defendant, had been associated with the District Attorney's office of Nassau County for 25 years (728). Of those years he spent 12 years as the District Attorney (731).* He operated his office on a "need to know" basis (1438) and enjoyed quite a reputation as a crime fighter, particularly against organized crime (732-733). He also did much of the investigating of major matters himself and was more an investigative D.A. than an administrative D.A. (733). Briefly stated, Mr. Cahn was active on a national scale and even on an international scale in connection with crime fighting and in connection with education of District Attorneys for improved law enforcement in this nation (734-737).

He testified that one day while in his office, he received a telephone call from an unidentified person who offered to be an informer for him (750). At this person's request, he met him at the Roosevelt Field Shopping Center in Nassau County (750). Cahn traveled to that meeting alone (751), but was kept under surveillance by Chief Spahr, a Police liaison officer who held the rank of Assistant Chief Inspector in Nassau County (636-638). Spahr testified that he followed Cahn to the rendezvous and observed the following:

> "A. You [Mr. Cahn] parked your car, stood alongside it for a while. A few moments later you were approached by a man. You had a conversation with this individual for about, I would say, fifteen minutes or a half hour. He left. You drove away. I left my car which was parked a considerable distance from where you were, followed this man on foot. He entered the shopping center and that was the last I saw of him at that time.

*Unless otherwise indicated, numbers in parentheses refer to pages in the Appendix filed with the Second Circuit.

Q. Could you describe Sam Houston, please? A. Yes, sir. He was male, white, about fifty years old. He was 5-8 or 5-9, medium build, dark hair." (639).

At the first meeting with the informer, Mr. Cahn testified that the following took place:

"He [the informer] told me [Cahn] he had a relative who was an informant for some law enforcement agency. He didn't tell me the relative and wouldn't tell me the law enforcement agency, but he said as a result of a leak his relative was killed. He was mad. He thought there was negligence. He thought it might have been deliberate.

He was coming to me to cooperate with me and he would give me information. He wasn't that much interested in money. He was more interested in the revenge. I told him that I wasn't going to buy a pig in a poke.

I asked him to give me information which would indicate to me some reliability on his part. He did. I just don't remember exactly what it was at that particular time.

He stipulated certain conditions. One, that I would never try to determine his true identity; two, that he would absolutely sign no receipt for any money given to him, and that he would tolerate—he didn't use the word tolerate, I am paraphrasing now—he did not want me to submit any vouchers or claims or anything else—and he was quite knowledgeable in that particular area—to anybody which would in any way suggest a payment.

I told him: 'You are making it impossible for me to pay you.'

He said: 'That is your problem.'

And I said, 'Look, we don't put names of informants—' and there was some discussion about that and he told me what I could do with the claim whether his name was on it or not. 'If you want me, I'm willing to go,' he said, 'but these are my conditions.'

The conversation lasted about a half hour and I told him he would have to get in touch with me thereafter.

Another one of the conditions was he would no longer meet me in the metropolitan area. I don't know, I don't remember at this moment, Mr. Bogin [the attorney examining Cahn on his direct case], whether he said the State of New York or not. However, he told me because of his position he had been in a position to meet me anywhere that I said almost at any given time. This was quite unusual. I had never heard of it before. And I said that he would have to let me know—Where can I get in touch with you, that question.

Q. Don't call me, I will call you? A. That was it. And I left." (751-753).

In order to solve the problem of paying the informer (hereinafter referred to as Sam Houston, the code name employed) according to his terms, Mr. Cahn communicated with the then County Comptroller, Angelo D. Roncallo (756). Roncallo did not remember the conversation to the same extent as Cahn (612 *et seq.*) who testified:

"He [Roncallo] told me he knew of no way of paying an informant without submitting a county voucher. Then I suggested to him that if I traveled on behalf of the County and traveled on behalf of the National District Attorneys' Association and received my expenses from the National District Attorneys' Association and used the money to pay the informant without submitting a voucher. would he have or would he know of any legal prohibition or any kind of prohibition at all." (756-757).

Mr. Cahn then researched the legality of his approach and concluded that it was permissible (759-760).

Reduced to its barest outline, Mr. Cahn testified that he was entitled to reimbursement from various organizations for travel in connection with business of those organizations and that he also had at his disposal a "Prosecution Fund" which was basically a fund of Nassau County money which was available for immediate use, but which had to be reimbursed as expeditiously as possible. Accordingly, Mr. Cahn developed the following method of having Nassau County pay the informer without reflecting it in actual claim forms to the County of Nassau:

1. Prior to embarking upon a trip for one of the organizations in which he was involved, he would draw expense money from the Nassau County Prosecution Fund because he was also going on the trip for County purposes—usually involving an extensive investigation of possible illegal activities at the Nassau County Jail, which involved extensive travel.

2. He would then go on the trip and perform both County business as well as business for the organization involved.

3. Upon return from the trip he would request in a letter, reimbursement for his expenses from the organization involved.

4. When this claim was paid to him, he repaid the County by cashing the check and placing the money in an envelope which he kept in his closet labeled "S.H." (761 *et seq.*).

It was and is the defendant's contention that, since Nassau County had the obligation to pay for informers for a District Attorney (87, 91), since he actually billed

the organization for the trip and since the County had already loaned money to Mr. Cahn for the trip out of the Prosecution Fund, the loan from the County was Repaid. This repayment was not done directly, by paying the monies into the Comptroller's office, but it was accomplished by creating a Sam Houston fund which was used exclusively for the payment of monies to Sam Houston, a County obligation. By this method of payment Mr. Cahn was able to keep his word and integrity to the informer, and he was able to get additional information from the informer at these various meetings. The total amounts paid to Sam Houston between January 1970 and November 1974 was $19,750. (765).

At the meetings with Sam Houston, Mr. Cahn had a witness who saw him pay Houston and heard him give Mr. Cahn the information. Defendant's Exhibit L (2070-2080) is a detailed account of meetings with Houston which Mr. Cahn kept. The entries begin on January 14, 1970 and run through November 10, 1974. In addition to the log, Mr. Cahn himself executed an affidavit every time he met Houston and every time a payment was made (2044-2069). Further, affidavits of the witnesses to the meetings—either Joseph Spinnato, an Assistant District Attorney, or Charles Spahr, an Assistant Chief Inspector of the Nassau County Police Department—sworn to around the dates of the meetings were introduced (2011-2041).

Because the organizations for whose purposes (in addition to the County purposes) Mr. Cahn was traveling were funded in whole or in part by the Law Enforcement Assistance Administration (LEAA), he was indicted for filing false statements under 18 U.S.C. §1001. That is, the Government contended that, since Nassau County was already paying for the trip because of County business,

Mr. Cahn's statement to the orginization, funded in whole or in part by LEAA monies, violated 18 U.S.C. §1001 in that he stated on the claim form submitted to the organization that he was not receiving reimbursement from any other source and that no other funds were available to reimburse him (33 *et seq.*). Count No. 2 of the indictment is also a false statement charge (31a-32a). Since the mails were being used for the purpose of transmitting various claims to the organizations, he was indicted for mail fraud (18 U.S.C. §1341).

In addition to the mail fraud and the false statement counts, the government included as count 46, the last count of the indictment, a charge that defendant obtained money by false pretenses by charging the NDAA $100 for hotel expenses that were provided for the defendant free of charge. This count is very crucial to the case, because the government did not include it in the original indictment, but it did include it in the superseding indictment. By virtue of its inclusion the government brought into evidence what it considered to be prior similar acts, which will be discussed below. With respect to this $100, Patrick Healy, the Executive Director of the National District Attorneys' Association, testified:

> "Q. Now, in this conversation in Washington with me [defendant], with reference to the complementary suite in Las Vegas, didn't you tell me that it was the policy of the Association [National District Attorneys' Association] to pay for the hotel lodging whether or not you slept on a park bench. A. You are entitled to it per diem, yes" (168-169).

It is essential to note that no proof was presented by the Government that defendant himself received any of these monies. Nor did the Government attempt to disprove the existence of the informer. In this regard, the

Government's contention, without any proof at all, was that Sam Houston might have been a collector of gambling debts. At no time was any gambling debt of Mr. Cahn demonstrated to have existed.

Further, nowhere is it claimed, nor is there any evidence, that defendant received expenses for trips that he did not take, or for services that he did not perform. The testimony is to the contrary in that defendant did, basically, what was expected of him. Nor is there any claim that Mr. Cahn received more than one payment for the same trip from the same entity—either the organization or Nassau County.

The aforesaid testimony together with more, will be developed in the argumentative portion of the petition and is not included herein because defendant does not wish to burden this Court.

The defendant was convicted on all counts.

At the sentencing the Court stated, among other things:

> "Another fact that I must consider here is that a sentence after trial is somewhat tentative because there is always a possibility of reversal at a new trial before another Judge. Any sentence that I impose puts a ceiling on what any other Judge can do if there is a third trial, another conviction, with different evidence." (1976).

Argument.

1. Certiorari should be granted because this case involves a significant question concerning the interpretation of a prior decision (*Blackledge v. Perry*, 417 U. S. 21) of

this Court and also involves an apparent conflict between the Circuits in connection with the application of *Blackledge.*

In *Blackledge,* this Court held that a person who had been convicted of a misdemeanor under State Law and who pursued his right of appeal must be able to do so unfettered by the apprehension that the State will retaliate by substituting a more serious charge for the original one, thereby subjecting him to significantly increased *potential* punishment. In *Blackledge,* a prison inmate was charged with and convicted of assault as a misdemeanor. He then exercised his right to appeal which, under North Carolina law, gave him a trial *de novo.* After the filing of the appeal, but before the trial *de novo,* an indictment charging the same conduct in terms of a felony offense (assault) was returned. This Court held that the indictment and the felony charge violated defendant's due process rights because a person convicted of a misdemeanor has every right to pursue his remedies without fear or apprehension that the government will "up the ante", 417 U. S. at 28. In *Blackledge,* this court held that the mere bringing of a more serious charge in response to a defendant's invocation of a right (the right to appeal) was violative of defendant's right to due process of law, 417 U. S. at 29. It is critical that, in *Blackledge,* there was no evidence whatsoever that the prosecutor had acted in bad faith or had maliciously sought the felony indictment against Perry. 417 U. S. at 28. Further, this Court specifically underscored the fact that defendant should have been free to exercise his right to appeal without any fear or apprehension that the government would retaliate by substituting a more serious charge for the original one, 417 U. S. at 28.

Relying upon the teachings of *North Carolina v. Pearce,* 395 U. S. 711, and *Blackledge,* the Court of Appeals for the Ninth Circuit held:

> "*Pearce* and *Blackledge* therefore establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive. We do not question the prosecutor's authority to bring the felony charges in the first instance * * *, nor do we question the prosecutor's discretion in choosing which charges to bring against a particular defendant * * *. But when, as here, there is a significant possibility that such discretion may have been exercised with a vindictive motive or purpose, the reason for the increase in the gravity of the charges must be made to appear." *U. S. v. Ruesga-Martinez,* 534 F. 2d 1367, 1369.

The Court in *Ruesga-Martinez* also stated:

> "The mere appearance of vindictiveness is enough to place the burden on the prosecution." 534 F. 2d at 1369.

The Court reversed the judgments of conviction and ordered that the indictment be dismissed.

In *United States v. Jamison,* 505 F. 2d 407, the Court of Appeals for the District of Columbia held that to reindict defendant for first degree murder after the first trial on a charge of second degree murder had ended in a *mistrial* denied Jamison due process of law in the absence of a showing of justification. The Court stated:

> "It would appear that the reasons for such increases, as well as the factual bases, must be made

a part of the record at the time the higher indictment is filed with the court. As to what reasons might be sufficient to justify a sentence increase, one such reason was referred to in *Blackledge,* namely, that the more serious charge could not have been brought when the lesser one was because the elements of the more serious crime were not at that time present, as where the victim of an assault had not yet died, raising the possible charge to one of homicide * * *. A second situation, one which we do not think can be sensibly distinguished from the first, is that in which the government through no fault of its own simply does not learn until after the first indictment that the assault victim has died." 505 F. 2d at 416.

The Court also stated that, because the record was barren of any reason why the first degree murder charge was brought

> "We can only conclude that the reindictment of appellants for first degree murder denied them due process and that their convictions of that charge cannot stand." 505 F. 2d 417.

In *Jamison,* too, the judgment of conviction was reversed and it was ordered that indictments be dismissed.

In *United States v. Johnson,* 537 F. 2d 1170, the Court of Appeals for the Fourth Circuit held that it violated the defendant's constitutional right to due process when he was charged with a 41 count indictment after his successful appeal which challenged a conviction, based upon a plea of guilty to one count of a four count indictment.

It is significant to note that the government in *Johnson* challenged the application of *Blackledge* and *Jamison* because in both cases the prosecutor at the time of the original indictment knew of the offense charged in the later

indictment. In *Johnson,* the United States Attorney conceded that he was aware of the possible new charges at the time of the plea to the original indictment. 537 F. 2d at 1173.

The Court disposed of the attempted distinction in *Johnson* by referring to the statements in *Blackledge* that the accused did not have to prove that he was an actual victim of retaliation. 537 F. 2d at 1173.

See also, *United States v. DeMarco,* 401 F. Supp. 505 (U.S.D.C.C.D. Cal).

In the case at Bar, the original indictment (75 CR 645) charged a total of 11 counts (eight mail fraud [18 U. S. C. 1341] one false statement [18 U. S. C. 1001], two perjury [18 U. S. C. 1623]). *The superseding indictment which was returned by the same grand jury without hearing additional evidence, but after the defendant had exercised his right to a trial which ended in a hung jury, contained a total of 46 counts* (ten false statement, thirty-six mail fraud).

In the Court of Appeals, the government sought to justify the increase in the charges by relying upon the following statement which was made by the Assistant United States Attorney at the hearing on the motion

> "The defendant testified in the grand jury that in forty-six of these instances he paid these monies to an informant by the name of Sam Houston, whose identity he did not know and whom he's not been able to locate. Rather than litigate the Sam Houston issue, and whether or not he exists, the government chose to take those seven counts or instances in which the defendant had not accounted for the monies generated by the double billing, and

> we put those in the first indictment. Defendant then claimed a trial and he said 'Oh, I made a mistake in my accounting. Some of the others didn't go to Sam Houston' and we wound up splitting four of the —litigating the Sam Houston issue. The government decided, since the Sam Houston thing came out, we might as well have the fifty-five or however many there are in the statute of limitations and let the chips fall where they may. That's the reason for the additional counts in the second indictment." (Resp.'s Br. in Ct. of App., pp. 22-3).

This "explanation" by the government, simply put, is that the addition of the 35 counts was justified since defendant raised a defense at the first trial. Implicit in this is that if the defendant did not raise the defense the counts would not have been added. Petitioner submits that this explanation by the government constitutes, on its face, a violation of the Blackledge doctrine as developed by the D. C., Fourth, and Ninth Circuits. Also the influence which the government had over this grand jury is apparent from its action in connection with the first indictment, the superseding indictment and the appearance of the entire grand jury in the courtroom at the second trial for the purposes of amending the indictment again.

In determining this appeal, the Court of Appeals for the Second Circuit stated

> "Among the reasons for our affirmance, the following may be briefly stated:
>
> This case is distinguishable from *Blackledge v. Perry*, 417 U. S. 21 (1974); *North Carolina v. Pearce*, 395 U. S. 711 (1969); and *United States v. Jamison*, 505 F. 2d 407 (D. C. Cir. 1974), in several respects, primarily in that those cases involve the possibility of penalizing a defendant for his successful assertion of his rights. Impermissible retaliation is not present here. Furthermore, the government has explained to our satisfaction why it did not originally seek an indictment on all the counts, for which Cahn was indicted the second time. All else aside, Cahn did not raise the claim before trial as required by Fed. R. Crim. P. 12(b). See *Davis v. United States*, 411 U. S. 233 (1973)."

It is submitted that the Second Circuit was in error in that the retaliation present in this case is not permissible under the precedents developed in the other Circuits and is, thus, in conflict with the holdings in those Circuits. Further, assuming that there was retaliation present, the reason for "upping the ante" should not have been acceptable to the Second Circuit in that it unabashedly penalizes the petitioner for raising a defense at the first trial. Finally, the Second Circuit is in error in connection with the timeliness of the application because the issue of due process was raised by motion *prior* to trial, petitioner did not plead to the superseding indictment and a plea was entered for him, and the motion was made in terms of the aforesaid cases after trial, when Judge Judd who presided at the trial specifically stated that it was "a rehash" of the prior motion.[1]

In sum, it is submitted that the defendant has been prejudiced by having to incur increased expenses, and inability to retain trial counsel, increased public scorn and embarrassment as well as exposure to increased penalties. Further, the inclusion of Count No. 46 in the superseding indictment was the predicate for introducing evidence of

[1] All of these reasons on the timeliness aspect of the case were raised in the reply brief before the Second Circuit, which brief, that Court determined not to accept because it had already reached its decision based upon the briefs which had been filed and upon the argument of the case.

other alleged similar acts which, as will be developed below, was highly prejudicial to the defendant. Further, the defendant actually did, in fact, receive an increased penalty on County No. 46: two years of unsupervised probation.

Because of the importance of the question presented by the above, because it involves an interpretation of *Blackledge* in a rapidly developing area of law, and because of the conflict between the circuits, the petition should be granted.

2. Certiorari should be granted because the case involves the interpretation of the extent to which a statement to a private organization funded by the federal government is governed by 18 U.S.C. §1001 and the interaction of 18 U.S.C. §1001 with 42 U.S.C. §3701.

18 U. S. C. 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or devise, a material fact, or makes any false, fictitious or fraudulent statement or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In *United States v. Marchisio,* 344 F. 2d 653, 666, the Second Circuit held that the four elements which constitute an offense under Section 1001 are:

1. A statement,

2. Falsity,

3. Statement was made knowingly and willfully, and

4. False statement is made in connection with a matter within the jurisdiction of any department or agency of the United States.

The superseding indictment charges (Counts 1-10) that the National District Attorneys' Association, the National Center for Prosecution Management, the National Police Task Force, the Arizona County Attorneys' Association, and the National Center for Prosecution Management reimbursed Mr. Cahn with funds which it had received from Law Enforcement Assistance Administration (LEAA).

It is significant to note that the indictment does not allege that the funds of this organization which actually paid Mr. Cahn were funds of an agency or department of the United States Government. At the trial it was developed that none of these entities which reimbursed Mr. Cahn are, in fact, agencies or departments of the United States Government, although they do receive some Federal funding (116, 131, 369, 360, 452, 527).

In *Lowe v. U. S.,* 141 F. 2d 1005, the Fifth Circuit Court of Appeals held that an employee who falsified an employer's payroll at a time that the employer was building ships for the United States Maritime Commission under a contract providing that the employer should be reimbursed for payroll payments by the United States Treasury could not be convicted for making a false statement as to "matter within the jurisdiction of a department or agency of the United States." The Court stated that the hours of work and rate of pay, as well as the control and supervision over the employee, were matters within the exclusive dominion of the private employer and that the misrepresentation as to the hours worked was made to an employee

of the private corporation under an arrangement whereby the wages which were to be paid by the corporation were to be reimbursed by the United States Treasury. The Court went on to state that insofar as the employee was concerned all aspects of his employment were exactly the same as if his employer did not have any contract whatsoever with a governmental agency, and that his employer's method of procuring payment under the contract did not change his relationship to his employee. In addition, the contract itself did not designate the payroll department as an agency of the United States, nor did it place that department under the control or supervision of any such agency. The matter was remanded to the District Court for the dismissal of the indictment.

In *Terry v. United States,* 131 F. 2d 40, Eighth Circuit Court of Appeals, in a case where an application for credit was made on Federal Housing Administration forms which contained nothing to indicate that the financial institution to which the application was addressed was an agency of the United States held:

> "We are of the opinion that on the charge and the proof in this case it would be contrary to the legislative intent to sustain this conviction. It is clear that the Housing Administration had no cognizance of the Williams Loan transaction on which the indictment rests at the time of the commission of the acts charged against defendant in respect to that transaction. Whether the Administration would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission be converted into a crime at a subsequent time by the independent action of other persons." (131 F. 2d at 44).

Further, Judge Dooling held on a motion to dismiss the false statement count of the *original* indictment:

> "The more serious question is whether Count 7 is sufficient in alleging an offense under Section 1001. Reference is made to 42 U. S. C. 3701-3795, which codifies the part of the Omnibus Crime Control and Safe Streets Act of 1968 which dealt with the Law Enforcement Assistance and Criminal Justice parts of the Act. Sections 3791 and 3792 deal with embezzlement and related wrongs affecting LEAA funds (3791) and the knowing and willful falsification, concealment or covering up by trick, scheme or device of any material fact in 'any application for assistance submitted pursuant to' the chapter (3792). It will be seen that the language of Section 3792 just paraphrased is identical with the first part of the language of Section 1001 which reads
>
> 'Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, . . . shall be fined . . . or imprisoned . . . or both.'
>
> Nothing, however, in Section 3792 goes on to pick up the remaining language of Section 1001 which is the following:
>
> '. . . or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined . . . or imprisoned . . . or both.'
>
> However, the Count as drafted is drafted under this latter quoted language of Section 1001 and not under that language of Section 3792 which is present also in Section 1001. It must be concluded

from this that the count is bad if it requires underpinning from Section 3792, for if that section is relied upon at all, it would appear that the charging language of the Count must express an offense within the language of Section 3792 rather than simply within the language of Section 1001. Whatever the reason for the particular language chosen and the particular approach taken in Sections 3792 and 3792, it seems clear that the LEAA offense, if intended to be singled out, must be charged in the language of Section 3792.

Whether Count 7 can be saved as a Count directly under Section 1001 was not really argued. The Government's brief simply assumed that it was enough that the National Center for Prosecution Management was an LEAA funded organization. But an entity hardly becomes an agency or department of the United States because it is funded under such an LEAA program, and, in the light of only authority so far seen, it must be concluded that the Count is not sufficient under Section 1001 standing alone.

Nor does it appear that the facts alleged could support a Section 3792 case. That section is limited to false material used in connection with an 'application for assistance submitted pursuant to' the Law Enforcement Assistance Chapter of Title 42. A claim for reimbursement of travel expenses made to an LEAA assisted entity, or in connection with an assisted program, would not be within the statute."

In the case at bar, the non-governmental organization had a finite sum of money some of which was federal money, and the claim of the defendant for reimbursement of his expenses was transmitted to the non-governmental entity which reimbursed him with that entity's funds, the entity never obtaining permission or consent of the Federal agency to make payment, and the agency never seeing the claim. Based upon the above, it is submitted that there is a complete failure of proof by the Government that the entity is one within the jurisdiction of any

department or agency of the United States as required by 18 U. S. C. 1001 as interpreted above.

Therefore, the Government has not proven one of the essential elements of the crime charged, i.e., that the statement was made in connection with a matter within the jurisdiction of an agency or department of the United States. Moreover, the indictment itself is defective for the same reason. Accordingly, counts 1 through 10 of the superseding indictment should be dismissed.

Further, it is submitted that, since 42 U.S.C. §3792 contains the provisions for crimes involving LEAA funds, Section 1001 has been pre-empted and counts 1-10 should have been dismissed on the law.

The Second Circuit stated that it found no merit in the aforesaid argument because "Cahn knew where the money was coming from". It is submitted that the aforesaid is an erroneous interpretation of 18 U.S.C. Section 1001 in that it permits a conviction under that section of a defendant who "knew" that the money he was receiving was money from a governmental agency which had been granted to a non-governmental private agency. It is submitted that the determination in this case puts the Second Circuit at variance with *Lowe v. U. S., supra,* of the Fifth Circuit, as well as with *Terry v. U. S., supra,* of the Eighth Circuit.

Reliance by the Second Circuit upon *U. S. v. Candella* 487 F. 2d 1223, is misplaced because the statements involved in *Candella* were included in affidavits which were submitted on forms prepared by the City of New York and not by HUD. However, the affidavits involved specifically contained advice to the signers which pointedly

made them aware of the nature and purpose of the affidavit and also advised them that false statement in the affidavit would be violative of the U. S. Code (487 F. 2d 1226). The case at bar is distinguishable on this point because, as set forth in defendant's main brief, it was established at the trial that none of the entities involved were, in fact, agencies or departments of the United States even though they did receive Fedral funding and, indeed, it is uncontradicted in the record that there was no policy of the LEAA regarding reimbursement for travel expenses actually communicated to Mr. Cahn, nor was he ever directly involved with any aspect of LEAA, nor did he ever claim directly to LEAA.

In sum, it is submitted that no crime has been stated under 18 U.S.C. 1001 and the holding in this case by the Second Circuit puts it again into conflict with other Circuits.

3. Because receiving dual reimbursement for the same expense from different entities who are obligated to pay is not criminal the mail fraud counts should be dismissed.

It seems that the government contends that it is a criminal act to claim expenses from private entities while concurrently claiming those same expenses from Nassau County in connection with trips during which the defendant performed distinct services for the County and for those other entities. In other words, is it a criminal act to claim reimbursement of the same expenses which are actually incurred from two entities each of which independently is obligated to reimburse travel expenses?

Since there is no federal common law of crimes (see, *Jerome v. United States,* 318 U. S. 101), in order for conduct to be considered a crime, there must be a specific

federal statute proscribing specific conduct and imposing a punishment. *Viereck v. United States,* 318 U. S. 236.

Not only is receiving two payments from two entities for a single expense not a crime, but an individual may invoke the aid of the courts to recover payments from each. For example, where one has coverage under two insurance policies, he may recover his expenses from both companies, unless it is expressly and unambiguously stated that expenses will not be reimbursed under such circumstances. See, *Rubin v. Empire Mutual Insurance* Company, 25 N. Y. 2d 426, 306 N. Y. S. 2d 914; *Thomas v. Universal Life Insurance Co.,* 201 So. 2d 529 (3rd Cir. Ct. App. La.); *Nationwide Mutual Insurance Co. v. Schilansky,* 176 A. 2d 786 (Mun. Ct. App. D. C. 1961). The law does not prevent the double reimbursement of expenses.

Even where the expenses were not actually paid by the civil claimant, the courts have enforced obligations to pay. See *Crosson v. N. V. Stoonvart Mij "Nederland,"* 409 F. 2d 865 (2nd Cir.), in which a stevedore was held liable for counsel fees to a shipowner, despite the fact that the shipowner's insurance company defended the action at no cost to the shipowner. See also, *Spurr v. LaSalle Construction Co.,* 385 F. 2d 322 (7th Cir.). In *North Central Airlines, Inc., v. City of Aberdeen, S. D.,* 370 F. 2d 129, 134 (8th Cir.), the court held that a tenant which had agreed to pay the landlord's expenses, was not affected by the fact that the landlord had insurance to cover its expenses.

This is not a civil case in which Mr. Cahn is seeking to declare his rights to payment from the private

entities involved. Nor is this case a civil case in which those private entities are seeking return of payments made.

Accordingly, because the indictment does not charge a crime it should be dismissed.

However, if the dual reimbursement of Mr. Cahn were criminal, it is submitted that in order to properly charge a crime, additional explicit allegations are required, e. g., actual knowledge and specific intent. Such "necessary allegations cannot be left to inference." *Williams v. United States,* 265 F. 2d 214, 218 (9th Cir.).

Because this essential element is absent from the indictment (33a-39a) the thirty-six mail fraud counts should be dismissed on the face of the indictment.

Further, it is submitted that no proof was adduced at trial which would make dual reimbursement for conceded expenses illegal. (See Point IV, *infra.*)

It must be noted in connection with the above that at no time was it ever contended by the Government that the same entity was charged twice for the same expense.

In this regard, in his charge, Judge Judd said:

> "Filing duplicate claims for one expense without disclosing the facts to one or both of the persons to whom the claims are presented can in and of itself be fraudulent. *It requires no expicit guideline, by-law, regulation, statute or policy formation to make it so.* Indeed, it is more to the point to say that no guideline, by-law, regulation, statute or policy formulation explicitly authorized dual payment for a single expense.

> It follows that ignorance of the existence of a by-law or policy on the point where one existed or had been articulated would not of itself excuse one who filed dual claims for reimbursement.
>
> Nevertheless, you must bear in mind the very important third essential element of each of these counts. That essential element requires that the Government show beyond a reasonable doubt that the defendant believed that the Association in question *might* not have allowed the claim for reimbursement if it had known that a second claim for reimbursement of the same expense was being presented at the same time." (1864-1865). (Emphasis added.)

It is submitted that the foregoing excerpt from the charge is reversible error because it recognizes that dual reimbursement may not be illegal and then it seems to unconstitutionally place upon the defendant the burden of disproving the possibility of criminality. Further, to state that an act may be criminal even though it violates no statute, guidelines, by-law, or policy formulation is error. See *Jerome v. United States, supra.*

Also, to predicate a criminal act on what a defendant believed "might" have happened, rather than on what he actually knew would have happened is error. To declare a legal act felonious, only because of an accused's belief, in the absence of any prohibition, whether public or private, being in any way communicated or chargeable to the accused violates due process.

In sum, it is submitted that there is no statute or regulation that prohibits dual billing; the indictment does not charge a crime on the mail fraud counts; and the proof at the trial falls far short of proving a crime on the mail fraud counts.

Accordingly, the judgment of conviction on the mail fraud counts should have been reversed and the counts dismissed. Failure to do so presents a question of law which this court should decide.

4. The admission of testimony concerning defendant's "prior similar acts" was an abuse of discretion, unduly prejudicial and deprived petitioner of a fair trial.

In *U. S. v. Dwyer,* 539 F. 2d 924, the Second Circuit stated:

> "Rule 403 of the Federal Rules of Evidence permits a trial judge to exclude relevant evidence 'if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.' In the balancing of probative value against unfair prejudice required by Rule 403, the trial judge has wide discretion • • • and ruling that he makes will not be disturbed unless such discretion has been clearly abused." At p. 927.

Further, the same Court held in *U. S. v. Viruet,* 539 F. 2d 295:

> "The admission of testimony concerning Viruet's participation in other transactions involving stolen goods was proper and was not unduly prejudicial • • •. There was a sufficient parallel between the acts charged in the indictment and the prior (and subsequent) acts shown by the testimony so that it had real probative value regarding appellant's willingness and intent to enter into the proven conspiracy rather than merely suggesting that the appellant was of poor character." At p. 297.

In the case at bar, it is submitted that it was reversible error to admit testimony of purportedly similar acts with respect to Mr. Cahn's alleged claim for monies from only Nassau County for expenses allegedly not actually incurred.

The entire indictment generally charges Mr. Cahn with receiving two payments for actually incurred expenses allegedly resulting in a fraud only upon a private entity, i. e., dual billing. The purported similar acts deal only with single payments by the County for expenses allegedly not incurred—the Hawaii trip, the London trip, the San Juan trip (300-309).

Judge Judd admitted such testimony on the theory that it was relevant to a part of Count 46, a count not contained in the original indictment (309, 357). On the first trial, Judge Dooling excluded the same evidence as not relevant to the charges of dual payments.

Essentially, the so-called similar acts involved trips to London, Hawaii and San Juan. The predicate for admitting testimony of these trips is that portion of Count 46 which relates to an alleged payment of $100 by NDAA to Mr. Cahn for expenses which he did not actually incur (40-a, 300-309). However, Mr. Healy of the NDAA testified that Mr. Cahn was entitled to that money as a per diem (168-169). Thus, even this basis for admitting the evidence proved lacking in foundation.

The admission of this testimony in which Mr. Cahn is depicted as allegedly falsifying expenses is highly prejudicial because of the overriding aspect of Mr. Cahn's integrity and credibility in the trial. In each instance he was forced to defend himself against accusations of dis-

honesty for which he had never been indicted. Both to introduce evidence of such acts and to defend them required voluminous testimony. Six of the Government's nineteen witnesses testified almost exclusively about these three expense payments totally outside the forty-six count indictment. Additionally, Mr. Cahn testified extensively about these payments and two other defense witnesses were brought into this County solely to give evidence about these matters.

Based upon the above decisions, the admission of this testimony was prejudicial error.

Coupling the prejudicial admission of the above evidence with the trial judge's erroneous statement in the charge:

> "And you may consider that he [Mr. Cahn] has perhaps more of a motive to slant the testimony and even to lie than any other witness in the case" (1873),

it is submitted that Mr. Cahn's credibility and integrity may have suffered a fatal blow in the eyes of the jury. Under the circumstances of this case, where credibility was made a critical issue, the admission of the similar act testimony denied defendant his right to a fair trial and the conviction should be reversed.

Conclusion.

Because the case presents grave issues concerning the interpretation of *Blackledge v. Perry, supra,* and because it presents questions concerning the scope of 18 U. S. C. §1001 and 18 U.S.C. 1341, and because it presents issues concerning the allowable discretion in connection with the admission of the similar acts evidence vis-á-vis petitioner's right to a fair trial, certiorari should be granted.

Respectfully submitted,

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FARRELL, FRITZ, CAEMMERER & CLEARY, P. C.,
December 6, 1976.

Appendix A.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of November, one thousand nine hundred and seventy-six.

Present:

Hon. Paul R. Hays
Hon. Robert P. Anderson
Hon. William H. Timbers
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM CAHN,
Defendant-Appellant.

76-1328

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed. Among the reasons for our affirmance, the following may be briefly stated: this case is distinguishable from *Blackledge v. Perry,* 417 U. S. 21 (1974); *North Carolina v. Pearce,* 395 U. S. 711 (1969); and *United States v. Jamison,* 505 F. 2d 407 (D.C. Cir. 1974), in several respects, primarily in that those cases involved the possibility of penalizing a defendant for his successful assertion of his rights. Impermissible retaliation is not present here. Furthermore, the government has explained to our satisfaction why it did not originally seek an indictment on all the counts, for which Cahn was indicated the second time. All else aside, Cahn did not raise this claim before trial as required by Fed. R. Crim. P. 12(b). See *Davis v. United States,* 411 U. S. 233 (1973).

We find no merit in Cahn's claim regarding the false statement counts under 18 U.S.C. §1001. *United States v. Candella,* 487 F. 2d 1224 (2 Cir. 1973); *Ebeling v. United States,* 248 F. 2d 429, 433-35 (8 Cir. 1957). Cahn knew where the money was coming from. We likewise find no merit in his mail fraud or prior acts claims.

With respect to Cahn's sentencing claim, we reiterate what we said in *United States v. Fiore,* 467 F. 2d 86, 90 (2 Cir. 1972), involving an almost identical comment by the same district judge.

Having carefully considered all of appellant's claims of error, we find them to be without merit and therefore affirm the conviction.

s/ PAUL R. HAYS
s/ ROBERT P. ANDERSON
s/ WILLIAM H. TIMBERS
Circuit Judges

No. 76-770

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM CAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1976. The petition for a writ of certiorari was filed on December 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that a superseding indictment, returned after the jury had been unable to reach a verdict on the original indictment, was not motivated by vindictiveness on the part of the government.

2. Whether the false statement counts of the indictment against petitioner charged an offense under 18 U.S.C. 1001.

3. Whether 42 U.S.C. 3792 pre-empts 18 U.S.C. 1001 in connection with false statements involving funds of the Law Enforcement Assistance Administration.

4. Whether petitioner's use of the mails to submit claims that knowingly failed to disclose facts that would have resulted in their rejection constituted mail fraud.

5. Whether the district court abused its discretion in admitting evidence of prior similar acts.[1]

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of making false statements in a matter within the jurisdiction of the Law Enforcement Assistance Administration (Counts One to Three) and seven counts of willfully and knowingly failing to disclose material facts in a matter within the jurisdiction of that federal agency (Counts Four to Ten), in violation of 18 U.S.C. 1001 and 2, and on 35 counts of mail fraud (Counts Eleven to Forty-Four and Count Forty-Six), in violation of 18 U.S.C. 1341.[2] He was sentenced to concurrent terms of imprisonment for one year and one day on Counts One to Forty-Four. The

[1]Petitioner's list of "Questions Presented" also contains a question that is not discussed in the petition, *i.e.*, whether 18 U.S.C. 1001 requires proof beyond a reasonable doubt that the alleged false statement was material. This issue was not raised in the court of appeals. In any event, as we show below, the evidence of the materiality of petitioner's false statements was overwhelming.

[2]Count Forty-Five was dismissed before trial on the government's motion (A. 37). "A." refers to the appendix filed in the court of appeals.

imposition of sentence on Count Forty-Six was suspended, and petitioner was placed on two years' unsupervised probation. A concurrent fine of $2500 was imposed on all counts (A. 1979). The court of appeals affirmed (Pet. App. A).

1. Petitioner was the District Attorney of Nassau County, New York. The evidence showed[3] that, over a five-year period, he attempted to generate cash for his own use by seeking reimbursement for the same travel expenses both from Nassau County and from a number of law enforcement organizations in which he was active. On some occasions petitioner certified falsely to the particular organization, or caused a member of his staff to certify falsely, that he was not receiving or could not receive compensation for his expenses from any other source; on other occasions petitioner failed to disclose the availability of funds from Nassau County, although each of the organizations from which he sought reimbursement either had written or unwritten rules that would have prohibited reimbursement if they had known of that fact. Evidence introduced on the issue of intent also established that petitioner often billed both Nassau County and an organization for hotel or other expenses that had been provided to him free of charge. Moreover, some three years after he had obtained $1,385 from the county for a trip that had actually cost him $395, and after an investigation of his fraudulent activities had commenced, petitioner approached a travel agent and asked him to corroborate a false story that would help to extricate petitioner from the investigation (A. 507-513).

[3]Petitioner's statement of "Facts Developed at Trial No. 2" (Pet. 5-11) is taken almost entirely from his direct testimony at trial. Petitioner's exclusive reliance upon his own testimony (which the jury rejected), his failure to set forth a complete statement of the case, and the essentially factual nature of many of his claims necessitate a relatively detailed summary of the evidence in this brief.

Petitioner's defense was based on a meeting he claimed to have had with an anonymous person whom he called "Sam Houston." This person allegedly offered to become a paid informant for Nassau County on the condition that extraordinary precautions would be taken to conceal his identity (A. 752-757). Although it was possible for petitioner lawfully to obtain money to pay an informant without divulging his identity simply by using a code number, "Houston" allegedly objected even to this procedure (A. 754).[4] Moreover, according to petitioner, "Houston" insisted on meeting in various locations around the country to impart his information.

Despite the fact that the tips petitioner claimed to have received from "Houston" at this initial meeting were merely a rehash of stories that had already appeared in Nassau County newspapers (S.A. 242-244; A. 1232),[5] clippings of which were collected by the District Attorney's Office, petitioner allegedly agreed to the informant's conditions. According to petitioner, in order to generate money to pay "Houston" he decided to arrange his extensive travel on behalf of various organizations to coincide with his business trips for Nassau County. The county and the organization on whose behalf he had travelled then would each be billed for reimbursement, and the latter funds would allegedly be used to pay "Houston" in cash. However, the Comptroller of Nassau County could recall no conversation in which the specifics of this plan had been discussed with him (A.

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[4]Petitioner nonetheless admitted that he used a code number to identify "Houston" in claims he made to Nassau County for reimbursement on trips during which he allegedly met the informant (A. 1298).

[5]"S.A." refers to the supplemental appendix filed in the court of appeals.

615-617), nor had any of the organizations been advised of the use to which their monies were purportedly being devoted.

Approximately $19,500 was allegedly paid to "Houston" from 1971 to 1974, even though all of the information that petitioner claimed "Houston" had provided had previously appeared in the newspapers or was otherwise already known in law enforcement circles (A. 1602-1620, 1192-1193, 1227-1250, 1320-1325). Indeed, no new cases were ever opened as a result of tips allegedly provided by the informant (A. 1327), nor were any investigations commenced by the Nassau County Police Department (A. 687).

2. Petitioner's first trial ended in a mistrial when the jury was unable to reach a verdict. The original indictment (excluding two counts of perjury that were severed) had contained eight counts arising out of the fraudulent double billing scheme described above: seven counts of mail fraud (18 U.S.C. 1341) and one count of filing a false statement in a matter within the jurisdiction of the Law Enforcement Assistance Administration ("L.E.A.A.") (18 U.S.C. 1001) (A. 11a-21a). These eight claims for dual reimbursement had been singled out because, in his grand jury testimony, petitioner had originally led the United States Attorney to believe that the proceeds of these claims had not been used to pay "Houston." Thus, the government assumed that a trial on these charges would not involve the issue of the alleged existence of the informant or a defense based on the allegedly beneficent use of the proceeds of the double billings (A. 186a-187a). At the first trial, however, petitioner testified that he had been mistaken and that he had in fact used the proceeds of the eight claims charged in the indictment to pay "Houston."

When it became apparent that there would be a retrial of petitioner's case, at which the "Houston" defense

would again be raised, the government determined to seek a new indictment that included all of the instances of double billing. Accordingly, the district court was expressly advised of the reason for this decision prior to the second trial (A. 186a-187a), and a superseding indictment was obtained. It charged 44 separate instances of double billing, including one (Count Forty-Six) that involved petitioner's seeking compensation for a hotel room that had been provided without charge and billing twice for transportation on the same trip.

3. The evidence against petitioner at the retrial was substantial.

a. Counts One and Two involved the filing of false statements within the jurisdiction of L.E.A.A., a federal agency that provided funds to the National College of District Attorneys (N.C.D.A.) for the specific program for which petitioner claimed reimbursement (A. 452). Petitioner was aware of the source of the money that was used to pay the claims he submitted (A. 453-457, 1167). The claim involved in Count One amounted to $142.73 for air fare for a trip to Chicago, Illinois. Since petitioner was also conducting business for Nassau County on this occasion (A. 801-802), the county paid the expenses for the trip. Nevertheless, petitioner sought payment from N.C.D.A. and certified "that other funds are not available and I am not receiving reimbursement from any other source" (G.X. 1A, S.A. 20).

The claim involved in Count Two arose out of the same trip. It was signed by Joseph E. Spinnato, the Chief of petitioner's Rackets Bureau. Although petitioner obtained the money to pay Spinnato's air fare from Nassau County, he did not advise Spinnato of this fact and instead had him execute a claim containing a certification identical to that signed by petitioner in Count One (A. 222-223; G.X. 2A, S.A. 23). When Spinnato received payment from N.C.D.A., he endorsed the check to petitioner, who cashed it (A. 220).

Count Three involved petitioner's filing of a similar false certification with the National Center for Prosecution Management. That organization is funded entirely by L.E.A.A. (A. 132-133), whose guidelines (as the claim forms submitted by petitioner indicated) govern the payment of its claims. Although petitioner received $246.80 from Nassau County for travel to a Board of Directors meeting in Mexico (G.X. 3, A. 2005-2006), he nevertheless certified that he was not receiving dual compensation for the trip (G.X. 3A, S.A. 26).

b. Counts Four to Ten involved seven claims for reimbursement to four different law enforcement agencies that were funded by L.E.A.A. and that, with petitioner's knowledge, paid the claims with federal monies. Indeed, two of the claims, which were paid with United States Treasury checks (S.A. 59-60, 62-63), were submitted on forms which expressly stated that "U.S. Government travel regulations" were applicable (S.A. 48, 51, 61). Although Nassau County again paid for each of these trips, petitioner failed to disclose that fact. None of these claims would have been paid if the truth had been known (A. 136-138, 260-261, 365, 459-460, 536-537).

c. The remaining counts charged petitioner with fraudulent use of the mails by obtaining reimbursement for travel expenses from organizations without disclosing that the trips had been paid for by Nassau County or that, in one instance, no expenses had been incurred (A. 35a-39a). Again, each of the defrauded organizations had rules that precluded payment in such circumstances (see, *e.g.*, A. 135-137).

ARGUMENT

1. Relying on *Blackledge* v. *Perry*, 417 U.S. 21, petitioner contends (Pet. 11-18) that the additional counts included in the superseding indictment were added to penalize him for exercising his right to a trial on the

original indictment, which ended in a mistrial when the jury was unable to reach a verdict. The court of appeals correctly rejected this claim, stating (Pet. App. 33):

> [T]his case is distinguishable from *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); and *United States* v. *Jamison*, 505 F. 2d 407 (D.C. Cir. 1974), in several respects, primarily in that those cases involved the possibility of penalizing a defendant for his successful assertion of his rights. Impermissible retaliation is not present here. Furthermore, the government has explained to our satisfaction why it did not originally seek an indictment on all the counts, for which [petitioner] was indicted the second time. All else aside, [petitioner] did not raise this claim before trial as required by Fed. R. Crim. P. 12(b). See *Davis* v. *United States*, 411 U.S. 233 (1973).

a. As the court of appeals held, petitioner's failure to present his *Blackledge* argument prior to trial constituted a waiver of that claim. Fed. R. Crim. P. 12(b) and (f). Contrary to petitioner's contention (Pet. 17), the due process claim he is presently asserting is entirely different from the one that he raised prior to trial. Petitioner's pre-trial motion to dismiss the superseding indictment did not allege that he was being penalized for exercising his right to go to trial or for putting on a defense, nor did it rely on any of the cases cited in the petition. Indeed, petitioner expressly conceded at that time that he "does not argue that he cannot be retried on the superseded indictment nor that the government is limited to using the same evidence adduced at the first trial" (A. 136a).

Instead, petitioner's pre-trial motion "disputed * * * the government's ability to intentionally hold back alleged violations from one indictment in order to obtain disclosure of the [petitioner's] case and refine its own

prosecution in light of events at the first trial" (A. 136a). Thus, petitioner's complaint related to the government's intention to add new counts at the retrial in order to enhance its evidentiary presentation,[6] not to the charge that the additional counts in the superseding indictment had been motivated by "retaliation." Not until after the second trial did petitioner suggest that the government had violated due process by adding the new counts out of vindictiveness (A. 1925).

b. In any event, petitioner's claim was correctly rejected by the court of appeals. In *Blackledge* v. *Perry*, *supra*, the Court held that the Due Process Clause prohibits the government from increasing the charges against a defendant at a retrial occasioned by the defendant's successful assertion of his legal rights. The Court's decision was expressly designed to remove the threat of prosecutorial vindictiveness aimed at discouraging a defendant from attempting to obtain a new trial or other relief (417 U.S. at 28). This rationale is wholly inapplicable here.

First, unlike *Blackledge* (where the defendant had exercised his statutory right to a trial *de novo*) or the lower court cases on which petitioner relies (where the defendant either had successfully moved for a mistrial,[7] vacated his conviction on collateral attack,[8] refused to plead guilty,[9] or insisted upon being tried by a district judge

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[6]This claim was properly rejected by the district court. This Court has observed that "the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence." *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 243. See also *United States* v. *Ewell*, 383 U.S. 116, 124-125.

[7]*United States* v. *Jamison*, 505 F. 2d 407 (C.A. D.C.).

[8]*United States* v. *Johnson*, 537 F. 2d 1170 (C.A. 4).

[9]*Hayes* v. *Cowan*, C.A. 6, No. 76-1409, decided December 30, 1976.

rather than a magistrate[10]), a retrial was required here not because petitioner had determined to assert his legal rights but because petitioner's initial trial had ended in a hung jury. The court had entered a mistrial *sua sponte* out of necessity. Thus, a holding that the government's conduct in this case violated due process would effectively immunize petitioner for past crimes while failing to accomplish the sole purpose underlying the decision in *Blackledge*—the elimination of practices that might operate to discourage defendants from seeking legal remedies available to them.

More importantly, as the court of appeals held, "[i]mpermissible retaliation is not present here. * * * [T]he government has explained to our satisfaction why it did not originally seek an indictment on all the counts, for which [petitioner] was indicted the second time" (Pet. App. 33). As we have already noted, the government expressly informed the district court prior to the retrial that, in order to simplify the issues, it had drafted the original indictment so as to include only those counts to which, according to petitioner's grand jury testimony, his "Sam Houston" defense did not apply (A. 186a-187a). Contrary to this grand jury testimony, however, petitioner testified at the first trial that the funds involved in the seven counts of the original indictment had in fact been used to pay the mysterious informant. Thus, when it became obvious that a second trial would be held and that the "Sam Houston" defense would again be presented to the jury, the government concluded that the considerations that had led to its decision to exclude the other charges from the initial indictment were no longer valid. It therefore sought a superseding indictment containing all of the offenses with which petitioner would have been charged had the government not been misled about the theory of his defense.

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[10] *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (C.A. 9).

On this record, the government clearly met its "heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive." *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367, 1369 (C.A. 9) (footnote omitted). This essentially factual determination, reached by two lower courts after an independent assessment of the evidence, does not warrant further review.

c. Even assuming that petitioner's contentions are correct, he nonetheless would not be entitled to a reversal of his entire conviction. The retrial and convictions on the seven counts listed in the original indictment was unquestionably proper, and the district court ordered petitioner's sentence on the additional counts to run concurrently with these valid convictions. See *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. See also *United States* v. *Poll*, 538 F. 2d 845, 847 (C.A. 9), certiorari denied, No. 76-249, November 29, 1976.[11] Moreover, petitioner suffered no collateral consequences from the additional counts: all of the evidence adduced at petitioner's second trial would have been admissible even if the retrial had been limited solely to the charges in the first indictment; the second trial, even with the increased number of counts, was shorter than the first;[12] and the jury's verdict—finding petitioner guilty on all counts—plainly was not the result of a compromise.

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[11] The sentence petitioner received also was substantially less than the court could have imposed if he had been convicted on all counts at the first trial. Petitioner would at most be entitled to a reversal of his conviction on Count forty-six, for which he received a sentence of two years' unsupervised probation.

[12] The first trial produced 2072 transcript pages from opening statement to verdict; the second, 1902 pages.

2. Petitioner contends (Pet. 18-24) that the false statement and concealment counts of the indictment failed to charge an offense under 18 U.S.C. 1001 because the fraudulent claims were not presented "in any matter within the jurisdiction of any department or agency of the United States * * *." It is settled, however, that if a false claim is presented to a non-federal agency that administers federal funds and the claim is paid with federal monies, the claim is deemed to have been made in a matter within the jurisdiction of the federal funding agency if the evidence establishes that the claimant was aware of these facts. *United States* v. *Lange*, 528 F. 2d 1280, 1287, n. 11 (C.A. 5); *United States* v. *Candella*, 487 F. 2d 1223, 1225-1227 (C.A. 2), certiorari denied, 415 U.S. 977; *United States* v. *Kraude*, 467 F. 2d 37, 38 (C.A. 9), certiorari denied, 409 U.S. 1076. Cf. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 543-544.[13]

As petitioner concedes (Pet. 19), each of the law enforcement groups listed in the false statement counts was funded either in whole or in part by L.E.A.A., which audits the books and records of its grantees (A. 254) and regulates the manner in which its grants are spent (A. 254-255). Moreover, it was also undisputed that petitioner's false claims were actually paid with L.E.A.A. funds. The evidence was clearly sufficient to establish that, on each occasion, petitioner was aware that his claim would be paid from the organization's federal grant (see, *e.g.*, A. 117, 118, 133, 138, 260-261,

[13]The false statement counts of the superseding indictment had been drafted to cure the defect found by the district court in its order dismissing Count Seven of the original indictment (S.A. 13). The count that was dismissed had alleged only that the organization to which petitioner's false claims had been presented was funded by L.E.A.A., rather than that petitioner's false claims had been paid with federal funds.

529-537; S.A. 26, 48, 51, 59-63; G.X. 3A), and the jury was expressly instructed that it had to find that petitioner knew or should have known of such federal funding before it could return a verdict of guilty (A. 1836).[14]

Moreover, there is no conflict among the courts of appeals on this issue. The two cases on which petitioner relies—*Lowe* v. *United States*, 141 F. 2d 1005 (C.A. 5), and *Terry* v. *United States*, 131 F. 2d 40 (C.A. 8)—have each been modified by subsequent cases in the circuit to reflect the principle that a false statement "need not have been submitted directly to a government agency for § 1001 to apply," so long as the false claimant has been "informed of the federal government's connection with the funding." *United States* v. *Lange, supra*, 528 F. 2d at 1287, n. 11. See also *Ebeling* v. *United States*, 248 F. 2d 429, 434 (C.A. 8), certiorari denied *sub nom. Emerling* v. *United States*, 355 U.S. 907.

Finally, petitioner's contention that "since 42 U.S.C. §3792 contains the provisions for crimes involving LEAA funds, Section 1001 has been pre-empted" (Pet. 23) was not raised below and has repeatedly been rejected in similar contexts. See, *e.g.*, *United States* v. *Gilliland*, 312 U.S. 86, 95-96; *United States* v. *Chakmakis*, 449 F. 2d 315, 316 (C.A. 5); *United States* v. *Burnett*, 505 F. 2d 815, 816 (C.A. 9), certiorari denied *sub nom. Lyon* v. *United States*, 420 U.S. 966. In any event, Section 3792 specifically incorporates 18 U.S.C. 1001.

[14]Although petitioner suggests (Pet. 23-24) that this case is distinguishable from *United States* v. *Candella, supra*, because there "the affidavits involved specifically contained advice to the signers which pointedly made them aware of the nature and purpose of the affidavit and also advised them that false statement[s] would be violative of the U.S. Code," these facts were relevant only to proof of the defendant's awareness that the non-federal agency was administering federal funds. Nothing in the court's opinion suggested that that element could not be proven by other types of evidence, such as the kind presented here. See pp. 6-7, 12, *supra*.

3. Petitioner contends (Pet. 24-28) that his conviction on multiple counts of mail fraud must be reversed because it is not "a criminal act to claim reimbursement of the same expenses which are actually incurred from two entities each of which independently is obligated to reimburse travel expenses" (Pet. 24).

The short answer to this argument is that it is premised on an erroneous view of the record. None of the organizations to which petitioner submitted false claims was "independently obligated" to reimburse him for expenses for which he had already been compensated. To the contrary, each of the organizations had well-established written or unwritten rules that would have barred payments resulting in double reimbursement (A. 138, 260-261, 365, 459-460, 537). Indeed, the National District Attorneys Association, of which petitioner was President and which received claims listed in 18 of the 35 mail fraud counts, had an express by-law precluding payment in such circumstances (A. 135-137).[15]

Nor is there merit to petitioner's related contentions that the district court placed upon him "the burden of disproving * * * criminality" and suggested that an act "may be criminal even though it violates no statute" (Pet. 27). The evidence clearly showed that petitioner was not entitled to be paid on the claims he submitted. In view of the court's statement that petitioner was charged with the use of the mails in furtherance of a scheme to defraud, which "embraces the general idea of a dishonest plan or scheme, the plan or scheme to obtain something to which one is not entitled by deluding another person

[15]The claims that form the basis for Count Forty expressly certified that "funds are not available * * * from any other source" to pay the incurred expense. This representation was plainly false and fraudulent even under petitioner's theory.

to turn it over to the planner" (A. 1851), and its repeated instructions that the government was required to prove beyond a reasonable doubt that petitioner "believed that the [National District Attorneys Association] or the other agencies might not have allowed the claim for reimbursement if it had known that the second claim for reimbursement for the same expenses [was] being presented to the County at the same time" (A. 1854; see also A. 1864, 1890-1891), the jury could have found petitioner guilty only if it concluded that he acted with fraudulent intent.[16]

4. Petitioner's final claim (Pet. 28-30) is that the district court abused its discretion in admitting evidence of prior similar acts. However, such proof is admissible if relevant to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). Here, the central issue at trial was petitioner's state of mind (A. 977). The challenged evidence involved instances in which petitioner had billed Nassau County for travel and other expenses that had been provided to him free of charge by hotels or travel agents. The evidence thus clearly tended to establish "a consistent pattern of conduct highly relevant to the issue of intent." *Nye & Nissen* v. *United States*, 336 U.S. 613, 618. In addition, proof that petitioner had importuned a travel agent to lie about one of these incidents in order to thwart the investigation was admissible to show guilty knowledge.

Whether the probative value of particular evidence outweighs its prejudicial effect is a question addressed primarily to the sound discretion of the trial judge, who

[16]Petitioner's attack on the sufficiency of the indictment (Pet. 26) is equally insubstantial. The indictment not only tracks the language of Section 1341 and specifically alleges that petitioner "did devise and intend to devise a scheme to obtain money * * * by * * * false and fraudulent pretense[s]" (A. 33a-34a), but it also sets forth in detail the essence of the scheme.

"has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." *United States* v. *Leonard*, 524 F. 2d 1076, 1092 (C.A. 2), certiorari denied, 425 U.S. 958. The court of appeals' affirmance of the district court's discretionary decision to admit the evidence in this case is correct and does not warrant further review.[17]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1977.

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[17]Petitioner also alleges (Pet. 30) that the district court erred in reminding the jury that he was an interested witness and that he may "perhaps" have had more of a motive to lie than other witnesses in the case (A. 1873). This charge, however, was proper (see *United States* v. *Tyers*, 487 F. 2d 828, 831 (C.A. 2), certiorari denied, 416 U.S. 971; *United States* v. *Jansen*, 475 F. 2d 312, 319 (C.A. 7), certiorari denied, 414 U.S. 826), and petitioner did not object to it.

IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-770

WILLIAM CAHN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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FARRELL, FRITZ, CAEMMERER
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March 16, 1977

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PETITIONER'S REPLY BRIEF

Statement

This brief is submitted in reply to that of the United States in this matter.

POINT I

Because the Government has failed to justify adding the additional charges to the superseding indictment, certiorari should be granted and it should be dismissed in all respects.

The Government contends that the due process argument is not properly before the Court because it was not timely raised below. In defendant's memorandum in support of his pretrial application to dismiss the superseding indictment an entire point is based on the double jeopardy and due process aspects of the case. Specifically, the point heading utilized in that memorandum states:

> "THE SUPERSEDING INDICTMENT IS BARRED BY THE DOUBLE JEOPARDY AND DUE PROCESS PROVISIONS OF THE FIFTH AMENDMENT." (65).

Particular attention is directed to pages 74a-75a in which a due process argument is specifically raised. Further, believing that the superseding indictment was a nullity, at the arraignment thereon, defendant stood mute, and the Court entered the not guilty plea on his behalf. Also, the due process aspect of the case as developed from *Blackledge* v. *Perry,* 417 U.S. 22, was appropriately raised by a post-trial motion which Judge Judd himself categorized:

> "Well, the motion is primarily a repetition and I thought for the record that I passed on that during the trial." (1959)

Accordingly, it is submitted that the issue has been properly and timely raised.

The prejudice which Mr. Cahn claims accrued because the government "upped the ante" in the superseding indictment is clear, particularly in the light of the additional punishment of unsupervised probation which was meted out in connection with Count No. 46. In addition the inclusion of Count No. 46 in the superseding indictment formed the predicate for the inclusion of the so-called "similar acts", all of which permeated the trial to such a degree, which, it is submitted, deprived the defendant of a fair trial on the charges in the superseding indictment. In essence, then, the prejudice is clear and, for the reasons set forth in the Petition, to try him on the superseding indictment was to deny him due process of law, and to twice place him in jeopardy with the result that the conviction may not stand.

The attempt of the Government to justify the superseding indictment as set forth on pages 5 and 6 of its Brief in Opposition should be unavailing. The Government admits that the superseding indictment was requested from the grand jury only because Petitioner, in the first trial, raised a particular defense: Sam Houston. In fact, such "jurisdiction" on its face spells out retaliation in that the claim is made that because of what transpired at the first trial, the additional counts were added. It is submitted that this conduct is precisely what the Courts in *U.S.* v. *Ruesga Martinez,* 534 F2d 1367, *U.S.* v. *Jamison,* 505 F2d 407 and *U.S.* v. *Johnson,* 537 F2d 1170, were condemning.

If it becomes critical to this application at this stage to determine the manner in which the Sam Houston defense was introduced into the first trial, then it is submitted that a hearing be held on the subject. In this regard, the Government should concede that it brought "Sam Houston" into the first trial itself by the introduction of Petitioner's grand jury testimony into evidence. Thereafter, Petitioner took the stand and had to get into the details.

Further, *U.S.* v. *DiMarco,* 401 F. Supp. 505, speaks at length about the role and function of the grand jury in our criminal justice system. In particular *DiMarco* was concerned with the necessity in our society for an independent and informed grand jury as described in *Wood* v *Georgia,* 370 US 375, and in *U.S.* v. *Calandra,* 414 US 338. It seems that the government, in the case at bar, was able to control the grand jury to such an extent in the first instance that it did not bring an indictment in connection with all the matters that were then before it. After the trial of the original indictment resulted in a hung jury, the government exercised even further control over the same grand jury that it then brought 35 additional charges without hearing any further evidence. The government's control over this grand jury is highlighted by bringing it into the courtroom right in the middle of the second trial in order to hand up to Judge Judd an amendment to the indictment. (870 et seq.).

Based upon all of the above, it is submitted that it is clear that the defendant's rights to due process and to be free of double jeopardy have been violated.

Accordingly, the Petition should be granted.

POINT II

The false statement counts are not governed by *U.S.* v. *Candella,* 487 F2d 1226.

The government takes the position that *U.S.* v. *Candella,* 487 F2d 1226, a 1973 decision of this Court, governs the false statement counts in this indictment. In *Candella* the statements involved were included in affidavits which were submitted on forms prepared by the City of New York and not by HUD. However, the affidavits involved specifically contained advice to the signers which pointedly

made them aware of the nature and purpose of the affidavit and also advised them that false statement in the affidavit would be violative of the U.S. Code (487 F2d 1226). The case at bar is distinguishable on this point because, as set forth in defendant's main brief, it was established at the trial that none of the entities involved were, in fact, agencies or departments of the United States even though they did receive Federal funding and, indeed, it is uncontradicted in the record that there was no policy of the LEAA regarding reimbursement for travel expenses actually communicated to Mr. Cahn, nor was he ever directly involved with any aspect of LEAA, nor did he ever claim directly to LEAA.

Accordingly, *Candella* does not control and, for the reasons set forth in Point II of petitioner's main brief, the false statement counts should be dismissed. Therefore, certiorari should be granted.

CONCLUSION

For the reasons set forth herein and in the petitioner's main brief, certiorari should be granted.

Respectfully submitted,

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FARRELL, FRITZ, CAEMMERER
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March 16, 1977

In the Supreme Court of the United States

October Term 1976

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vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITION FOR CERTIORARI

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITION FOR CERTIORARI

Interest of Amicus

The membership of the National Association of Criminal Defense Lawyers consists of approximately one thou-

sand lawyers, who are citizens of almost every State of the union, and almost all of whom are actively engaged in the defense of persons accused of crime. One of its primary institutional objectives is to prevent the erosion of constitutional safeguards, with special emphasis to developments tending to penalize or impair the exercise of the Sixth Amendment right to counsel. This brief is tendered in the discharge of that organizational objective. It is filed with the consent of all parties.

Amicus believes that the scope of certain questions framed by the petitioner necessarily implicates issues of special concern to amicus. This brief is limited to suggestions concerning the importance of those issues.

Amicus supports the petitioner's prayer that certiorari be granted.

Opinions Below and Jurisdiction

In this aspect, amicus adopts the recitations of the Petition for Certiorari.

Questions Presented

The issues of special concern to amicus, implicit within the questions framed by the petitioner, are as follows:

1. Does the prohibition against retaliatory escalation of jeopardy, as enunciated in *Blackledge v. Perry*, 417 U.S. 21 (1974) and *North Carolina v. Pearce*, 395 U.S. 711 (1969) apply only to a *successful* assertion of rights by an accused?

2. Where a prosecutor deliberately omits certain charges from an indictment in an attempt to render irrelevant the defendant's theory as anticipated through his grand jury testimony; and where the trial of that indictment results in a hung jury; may the prosecutor then justify a superseding indictment which includes the additional charges originally withheld, by stating that such additional charges are tactically desirable in the light of defense contentions exposed during the first trial?

Constitutional and Statutory Provisions Involved

Amicus would suggest that this case involves the following constitutional provisions, in addition to that cited by petitioner:

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * * and to have the Assistance of Counsel for his Defence.

Statement of the Case

Amicus adopts and relies upon the statement of facts recited by the petitioner.

Reasons for Granting the Writ

I

LIMITING DUE PROCESS PROTECTION TO "SUCCESSFUL" ASSERTIONS OF RIGHTS INFRINGES THE RIGHT TO FULL ASSISTANCE OF COUNSEL.

Petitioner was originally tried on seven counts. The trial of that indictment ended with a hung jury. He was then re-indicted on forty-six counts.

It is beyond question that the additional charges were brought because, and only because, the first trial did not result in conviction.

Facially, that would appear an obvious violation of the doctrines of *Blackledge v. Perry* 417 U.S. 21 (1969) and *North Carolina v. Pearce*, 395 U.S. 711 (1969)

The Court of Appeals held those authorities inapplicable because, in the view of that court, *Blackledge* and *Pearce* forbid only "penalizing a defendant for his *successful* assertion of his rights." (Pet. at 33) (Emphasis added)

That is not a misreading of the opinion, nor is it an inadvertent statement by the Court of Appeals. Instead, it reflects the acceptance of the government's view of those cases. In its brief to the Court of Appeals, the government stated:

> "We do not believe that [*Blackledge* and *Pearce*] support the proposition which [petitioner] deduces from them. They stand at most for the proposition that where the defendant is *successful* in setting aside a conviction, or has *successfully* asserted a right for which he should not be punished, the charges against him may not be increased or multiplied without some justification. But here the defendant did not *successfully* assert any right." (Brief for the Appellee at 24). (Emphasis added).

Nothing in *Blackledge* or *Pearce* can fairly be read as limiting the prohibition against retaliatory augmentation of jeopardy to cases wherein the retaliation is directed against a successful defense. Indeed, *Blackledge* and *Pearce* would lose the bulk of their force as thus interpreted. Those cases denounce the chilling effect upon the assertion of constitutional rights which would derive from the penalizing of an attempt to assert those rights. Such chilling is equally effective as a deterrent regardless whether retaliation is provoked by ultimate success or ultimate failure; for the decision to asset a right is seldom if ever the product of an unqualified prediction of success. The outcome of any attempt to exercise a constitutional right is essentially unpredictable. But obviously, a defendant would be no less deterred from an appeal if he believed that additional charges might result from the affirmance of a conviction, than if he believed that additional charges might result from a reversal.

In the view of the Court of Appeals, a convicted defendant might be told, with constitutional propriety,

> "You have a constitutional right to appeal. If you appeal and are successful, there will be no retalia-

> tion against you. But if you appeal and are unsuccessful, we will do our best to see whether there might be some additional charge which could be brought against you."

We suggest with some confidence that a defendant thus advised, would be no less hesitant to appeal than would a defendant who is flatly told:

> "If you appeal and obtain a new trial, we will increase your sentence if you are convicted a second time."

Indeed, the "success" test is likely to be far more chilling than would the converse rule. For example, as applied to appeals, there are very many more affirmances of convictions than there are reversals.

Thus, the "success" test would render the *Blackledge-Pearce* doctrine virtually meaningless. The "success" test can also lead to absurd anomalies as shown by the case at bar. By the government's theory, if a petitioner had been convicted at the first trial, and the conviction then reversed on appeal, that would have represented "success", thus precluding retaliatory actions. A mistrial, on the other hand, is viewed as a "failure", or at least as a "non-success", rendering additional retaliatory charges permissible. A legal principle which treats a conviction, subsequently reversed, as conferring greater collateral rights than would a mistrial, may with restraint be characterized as artificial.

If a mistrial is to be regarded as a lack of "success." then the same may be said *a fortiori* of such defense moves as motions to suppress, jury demands, and, indeed, a request for counsel, regardless whether such requests are granted or refused. Such actions, like a mistrial, do not work a substantive change in the defendant's status. We suggest that the right to counsel is no less subject to impairment by the "success" test, than is any other constitutional right. Quite beyond the fact that the very presence of counsel reflects a constitutional right in itself, among the primary functions of counsel is to advise his client of the existence of all other rights and to urge those rights in his behalf. If assertion of those rights is to invite retaliation, the advice itself must be temporized and the status of the decision to assert a right is seldom if ever the product of an advisor thereby denigrated. Any knowledgeable client must feel less than free to act on his lawyer's advice to exercise a constitutional right if he believes that unless such exercise results in ultimate success he is inviting retaliatory escalation of jeopardy.

Finally, we are constrained to point out that the Second Circuit "success" test appears to be in direct conflict with the District of Columbia Circuit case of *United States v. Jamison*, 164 U.S. App. D.C. 300, 505 F.2d 407 (1974) and the recent Sixth Circuit case of *Hayes v. Cowen*, ____ F.2d ____, 20 CrL 2308 (Dec. 30, 1976).*

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* One further note may be in order. Petitioner has contested the accuracy of the Second Circuit', statement that he "did not raise this claim before trial as required . . . ." (Pet. at 33). Under *Blackledge v. Perry*, 417 U.S. 21, 29-31 (1974) failure to raise the claim pre-trial would not in any event foreclose review.

II

THE PROSECUTOR'S OBTAINING OF THE SUPERCEDING INDICTMENT VIOLATED RIGHTS PROTECTED BY THE INTERPLAY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION, THE GRAND JURY SAFEGUARD, AND OUR ACCUSATORIAL SYSTEM OF CRIMINAL JUSTICE.

In this case, the petitioner was forced to become something more than a mere source of information to the prosecutor. He was converted into an involuntary advisor on questions of policy and strategy, quite literally charged with the development of the prosecution work product.

It was petitioner's basic theory that the double-billings constituted a permissible technique for the payment of informants.

He was called before a grand jury. The prosecutor, evaluating petitioner's story, carefully selected for his indictment seven transactions as to which the defense theory was deemed least applicable.

Trial on those charges ensued, ending in a hung jury. Evaluating the defense at that trial, the prosecutor concluded that he would derive a tactical advantage from reindicting adding other charges which he had previously withheld in the light of the defendant's position as originally understood by the prosecutor.

In the Court of Appeals, that rationale was viewed as an acceptable explanation for the augmentation of

charges. As there viewed, the prosecutor was not indulging in impermissible retaliation. Instead, he was simply using the grand jury to adjust his strategy in the light of his new understanding of the nature of the defense.

If the grand jury as employed in this case is viewed as having any independent function at all—if it is viewed as anything other than a supine rubber stamp—then it necessarily follows that the prosecutor was using the grand jury for the impermissible purpose of developing facts against a defendant then under indictment.

If, on the other hand, the grand jury function in this case is viewed as simple endorsement of the prosecutor's request for additional charges without additional evidence, then it necessarily follows that the Court of Appeals has approved the concept of a "floating" charge tactically determined by the defendant's reaction rather than by the prosecution's evidence.

It is one thing to say that in the light of the developments at an earlier trial, a prosecutor may introduce new evidence, or adopt new arguments at a second trial. Further, if a defendant's evidence produces proof of a different offense, it may well be proper to charge him with that offense regardless of the outcome of the trial at which his collateral criminality is exposed. But it is very much a different thing to say that after an indictment has been returned, the prosecutor may revise the charge itself to meet a defense theory disclosed in the course of resistance to an unsuccessful attempt at conviction.

Conceptually, it is an abandonment of all claim of constitutional propriety to adapt a charge to the nature of the

anticipated defense. An accusatorial system of jurisprudence depends for its definitional vitality upon the proposition that a charge, no less than a conviction, must reflect the strength of the prosecution rather than the weakness of the defense. The "floating" charge — the charge which adapts itself, chameleon-like, to the nature of the defense — can have no place in such a system.

In the case at bar, such a charge is deemed not merely tolerable: It is viewed as an acceptable predicate for an increase in jeopardy after disclosure of the nature of the defense — not because the defense has confessed some new crime, but because the prosecution now sees an easier path to conviction.

We urge that the accusatorial system of justice is directly imperiled by an approach such as that reflected by the judgment below. Accordingly, we endorse the petitioner's prayer for writ of certiorari.

Conclusion

For the foregoing reasons, we urge that certiorari be granted and that the judgment below be reversed.

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